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MAY 21 2004

In re Application of
Richard Naimish
Application No. 09/765,174
Filed: January 18, 2001
Attorney Docket No. Roh-N

OFFICE OF PETITIONS
DECISION ON PETITION

This is a decision on the "PETITION TO WITHDRAW HOLDING OF ABANDONMENT" filed March 29, 2004.

It is noted that this petition follows the filing of a PETITION UNDER 37 CFR 137(A) FOR REVIVAL OF AN ABANDONED APPLICATION WHERE THE DELAY WAS UNAVOIDABLE," filed March 1, 2004, and a decision mailed March 9, 2004 dismissing that petition. Further, this petition relies on substantially the same arguments and evidence presented on petition under § 1.137(a).

The petition is **DENIED**.

The above-identified application became abandoned for failure to file a timely and proper reply to the non-final Office action mailed November 20, 2002. This Office action set a three-month shortened statutory period for reply, with extensions of time obtainable under § 1.136(a) or (b). No reply having been received, the above-identified application became abandoned on February 21, 2003. A Notice of Abandonment was mailed on December 17, 2003.

The prior petition under § 1.137(a) was dismissed on the basis that petitioner had not shown that an amendment was filed in compliance with 37 CFR 1.10, and that the failure to do so and to preserve evidence of having done so is not "unavoidable" within the meaning of § 1.137(a). See *Krahn v. Commissioner*, 15 USPQ2d 1823, 1825 (E.D. Va. 1990). In fact, petitioner indicated that the paper was not filed in compliance with § 1.10. 37 CFR 1.10(b) provides that the paper(s) or fee(s) that constitute the correspondence should also include the "Express Mail" mailing label number thereon. Specifically, petitioner stated that "The Express Mail number was not entered on the original Transmittal, but was affixed to the file copy in accordance with internal procedures." (Petitioner thereby admitted that the transmittal submitted on petition showing the Express Mail mailing number is not a true copy of the transmittal as filed with the Office).

On instant petition, petitioner has made the same arguments except he has deleted the admission that the transmittal did not bear the Express Mail mailing number. In addition, he has

included a copy of an informal communication from Tamara McClure of the USPTO, with a Revenue Accounting and Management report, acknowledging that a fee of \$126 was received in the Office with a mail room date of February 13, 2003; and a copy of the amendment. Petitioner maintains that the evidence now shows that the response was both submitted to and received by the USPTO prior to the due date for the response.

For the reasons set forth in the decision dismissing the petition under § 1.137(a) mailed March 9, 2004, petitioner's evidence is unpersuasive that the amendment was timely filed in compliance with § 1.10. The amendment does not include the Express Mail mailing label number. Given petitioner's admissions, the copy of transmittal submitted cannot be relied on as a true copy of any original transmittal submitted. Thus, it is not persuasive evidence of timely filing under § 1.8 or § 1.10. See § 1.8(a)(1)(i)(A) and § 1.8(b). (It is further noted that the petition does not include a statement which attests on a personal knowledge basis of the previous timely mailing by Express Mail).

As previously stated, receipt of a paper including the \$126 fee does not establish receipt of any amendment applicant intended to file with the fee. Further, petitioner has not submitted a itemized date-stamped return postcard receipt showing that the amendment was among the papers deposited on February 13, 2003. In view thereof, the petition must be denied.

Further correspondence with respect to this matter should be addressed as follows:

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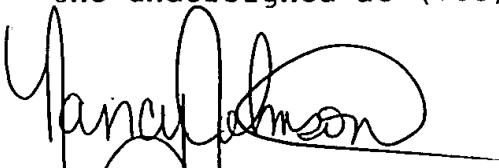
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Telephone inquiries related to this decision may be directed to the undersigned at (703) 305-0309.

A handwritten signature in black ink, appearing to read "Nancy Johnson". The signature is fluid and cursive, with a large loop at the end.

Nancy Johnson
Senior Petitions Attorney
Office of Petitions